86-525

Supreme Court, U.S.
FILED
SEP 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

PAN AMERICAN WORLD AIRWAYS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

AND RELATED CROSS AND THIRD PARTY ACTIONS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT S. VENNING
(Counsel of Record)
SCOTT A. FINK
KEVIN R. JOHNSON
HELLER, EHRMAN, WHITE & MCAULIFFE
333 Bush Street
San Francisco, CA 94104
Telephone: (415) 772-6000
Counsel for Petitioner

BOWNE OF SAN FRANCISCO INC • 190 NINTH ST • S F CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

Can a defendant, or can *only the plaintiff,* in an employment discrimination action appeal under 28 U.S.C. § 1292(a)(1) a District Court order denying a joint motion to enter a consent decree containing injunctive and monetary relief that would settle the entire action? More generally, under what circumstances is denial of a joint motion by plaintiff and defendant for entry of an agreed-upon consent decree to settle a case an appealable order under Section 1292(a)(1)?

In the alternative, can the defendant appeal a District Court order denying a joint motion to enter a consent decree as a "collateral order" under 28 U.S.C. § 1291?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Background	2
1. First Proposed Consent Decree	4
2. Second Proposed Consent Decree	5
B. District Court Decision	6
C. Court of Appeals Decision	7
REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI	7
A. This Case Presents Significant and Important Issues Concerning the Appealability Under 28 U.S.C. § 1292(a)(1) of Orders Refusing to Enter Consent Decrees Jointly Sought By Plaintiff and Defendant	7
1. The Ninth Circuit's Decision Conflicts with this Court's Holding in *Carson v. American Brands,* with the Eighth Circuit's decision in *International House of Pancakes Litigation,* and with the reasoning of the Seventh Circuit in *Donovan v. Robbins*	10
a. The District Court Order Denied Pan Am Injunctive Relief	12
b. The District Court Order Will Cause Pan Am "Serious, Perhaps Irreparable, Consequence"	13
c. The District Court Order Can Only Be Effectively Challenged By Immediate Appeal	14

TABLE OF CONTENTS

	Page
2. The Ninth Circuit's Holding Runs Afoul of the Strong Policy Favoring Voluntary Settlement of Employment Discrimination Actions	15
3. Conclusion	16
B. This Case Presents a Significant and Important Issue Concerning the Appealability Under 28 U.S.C. § 1291 of Orders Refusing to Enter Consent Decrees on Which There is a Clear Conflict Among the Circuits	18
CONCLUSION	22
APPENDIX	
A. Court of Appeals Opinion	A-1
B. District Court Opinion	A-8

TABLE OF AUTHORITIES

Cases

Page

Airline Pilots Association, International v. Trans World Airlines, Inc., 713 F.2d 940 (2d Cir. 1983), *cert. granted sub nom. Trans World Airlines, Inc. v. Thurston*, 465 U.S. 1097 (1984), *aff'd in part, rev'd in part*, 469 U.S. 111 (1985) 5

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) 15

Bank of Columbia v. Sweeney, 26 U.S. (1 Pet.) 567 (1828) 18

Carson v. American Brands, Inc., 450 U.S. 79 (1981) .. *passim*

Carson v. American Brands, Inc., 606 F.2d 420 (4th Cir. 1979) (en banc), *rev'd*, 450 U.S. 79 (1981) 8, 13

Carson v. American Brands, Inc., 446 F. Supp. 780 (E.D. Va. 1977), *appeal dismissed*, 606 F.2d 420 (4th Cir. 1979) (en banc), *rev'd*, 450 U.S. 79 (1981) 8

Cobbledick v. United States, 309 U.S. 323 (1940) 18

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 18, 20

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 19, 21

Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950) 17, 19

Donovan v. Robbins, 752 F.2d 1170 (7th Cir. 1985) 2, 8, 14

EEOC v. Consolidated Edison Co., 557 F. Supp. 468 (S.D.N.Y. 1983) 7

EEOC v. Eastern Air Lines, Inc., 97 F.R.D. 646 (S.D. Fla. 1983), *appeal dismissed*, 736 F.2d 635 (11th Cir. 1984) 7

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 18

Gardner v. Westinghouse Broadcasting Co., 437 U.S. 478 (1978) 21

In re International House of Pancakes Franchise Litigation, 487 F.2d 303 (8th Cir. 1973) 8, 9, 10

Liberty Mutual Insurance Co. v. Wetzel, 424 U.S. 737 (1976) 12, 13

TABLE OF AUTHORITIES

CASES

Page

Local No. 93, International Association of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986) 15, 16

Norman v. McKee, 431 F.2d 769 (9th Cir. 1970), *cert. denied sub nom. Isi Corp. v. Myers*, 401 U.S. 912 (1971) 19, 20, 21

Plummer v. Chemical Bank, 668 F.2d 654 (2d Cir. 1982) 14

Richardson-Merrell, Inc. v. Koller, 105 S. Ct. 2757 (1985) 18

Santana v. Collazo, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984) 11, 15

Seigal v. Merrick, 590 F.2d 35 (2d Cir. 1978) 19, 20

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S. Ct. 613 (1985) 5, 6

United States v. Armour & Co., 402 U.S. 673 (1971) 9

United States v. River Rouge Improvement Co., 269 U.S. 411 (1926) 18

Western Airlines, Inc. v. Criswell, 105 S. Ct. 2743 (1986) 6

W.R. Grace & Co. v. Local 759, International Union of United Rubber Workers, 461 U.S. 757 (1983) 10, 13

Statutes

28 U.S.C. § 1254(1) (1982) 2
§ 1291 (1982) ..... *passim*
§ 1292(a)(1) (1982) ..... *passim*

Age Discrimination in Employment Act, 29 U.S.C. §§ 621-633a (1982) ..... *passim*

Civil Rights Act of 1964, Title VII 42 U.S.C. § 2000 *et seq.* (1982) 8, 15

Employment Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* (1982) 4

TABLE OF AUTHORITIES

Regulations

Page

14 C.F.R. § 121.383 (1986) 3

29 C.F.R. § 1608.1(b) (1985) 15

29 C.F.R. § 1626.12 (1985) 15

Rules

Fed. R. Civ. P. 19 3

23 ..... 6, 7

Supreme Court Rule 17 ..... *passim*

21.1(b) 3

28.1 1

Legislative History

House Rep. No. 805, 90th Cong., 1st Sess. (1967), *reprinted in* 1967 U.S. CODE CONG. & AD. NEWS 2213, 2218 ... 16

Other Authorities

16 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 3924 (Supp. 1986) 12

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 18TH ANNUAL REPORT (1985) 15

Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89 (1975) 17

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

PAN AMERICAN WORLD AIRWAYS, INC.,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

AND RELATED CROSS AND THIRD PARTY ACTIONS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Pan American World Airways, Inc. ("Pan Am")[1] respectfully requests that this Court grant a petition for writ of *certiorari* to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this action on August 8, 1986. The Ninth Circuit found that it lacked jurisdiction over the District Court's order denying a joint motion of Pan Am and the Equal Employment Opportunity Commission ("EEOC") to enter a consent decree that would have settled an employment discrimination action. Pan Am contends that the Ninth Circuit erred in finding that the order was not appealable as a denial of injunctive relief under 28 U.S.C. § 1292(a)(1) and that its decision conflicts with this Court's holding in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981) and the reasoning of the

[1] Pursuant to Supreme Court Rule 28.1, Pan Am states that its parent corporation is Pan Am Corporation.

Seventh Circuit applying that case in *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985) (Posner, J.). In the alternative, Pan Am contends that the order is a collateral order appealable under 28 U.S.C. § 1291 and that this Court should resolve a conflict between the Circuits on this important and recurring question.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Ninth Circuit is reported at 796 F.2d 314 and is reprinted in the Appendix hereto (A 1-7). The opinion of the United States District Court for the Northern District of California is reported at 622 F. Supp. 633 and is reprinted in the Appendix hereto (A 8-34).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 8, 1986. This Court has jurisdiction to review the judgment of the Ninth Circuit under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

28 U.S.C. § 1292(a)(1) (1982) provides in relevant part that "the courts of appeals shall have jurisdiction of appeals from . . . [i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing, or dissolving injunctions, or refusing to dissolve or modify injunctions."

28 U.S.C. § 1291 (1982) provides in relevant part that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

STATEMENT OF THE CASE

A. Background

The Equal Employment Opportunity Commission ("EEOC") filed this action against Pan Am in September, 1981, alleging that Pan Am's policies with respect to employment of persons disqual-

ified by the Federal Aviation Administration's Age 60 Rule, 14 C.F.R. § 121.383(c), from serving as pilots violated the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-633a.[2] The EEOC specifically claims that Pan Am violated the ADEA by refusing to permit senior pilots to serve as flight engineers past the age of 60 because Pan Am (1) has not permitted pilots to displace (or "bump") flight engineers upon reaching the age of 60 and (2) has not permitted pilots, who have reached age 60, to retain seniority after their retirement from pilot positions for the purpose of bidding on flight engineer vacancies. The EEOC seeks injunctive relief requiring Pan Am to restructure its cockpit employment policies, the reinstatement of 81 pilots retired pursuant to Pan Am's policy, and ancillary relief. The EEOC also seeks back pay and liquidated damages for the former pilots.

Pan Am filed a cross-complaint against the Air Line Pilots Association ("ALPA") and a third party complaint against the Flight Engineers International Association ("FEIA"), the certified representatives of the pilots and flight engineers, seeking injunctive relief in the form of modification of Pan Am's collective bargaining agreements in the event that the District Court granted injunctive relief. The EEOC subsequently added ALPA and FEIA to the complaint as defendants under Federal Rule of Civil Procedure 19(a).

---

[2] Pursuant to Supreme Court Rule 21.1(b), Pan Am states that the nominal defendants in this action are the collective bargaining representatives of Pan Am's pilots, the Air Line Pilots Association ("ALPA"), and flight engineers, the Flight Engineers International Association ("FEIA"). The District Court also considered objections to the entry of the consent decree by the National Airlines ("NAL") Chapter FEIA on behalf of former NAL flight engineers, *see infra* note 3, Charles P. Caudle and Vincent Wynne on behalf of former NAL pilots, A.M. Rankin on behalf of a group of airmen furloughed by Pan Am, and 45 former pilots. In the appeal before the Ninth Circuit, the EEOC, the NAL Flight Engineers, and the former pilots filed briefs.

1. First Proposed Consent Decree

This case was set for trial in April, 1983, after a year-and-one-half of extensive discovery. Shortly before trial, Pan Am and the EEOC reached a settlement. Pan Am and the EEOC lodged a consent decree, which would have implemented that settlement, with the District Court and jointly moved for its approval (A 8, 12-13). The decree provided for injunctive relief and also provided the former pilots with an opportunity to be employed as flight engineers. Besides the injunctive relief, Pan Am would have paid equal shares of $250,000.00 to those former pilots who chose not to return to work.

The other two nominal parties to the action, ALPA and FEIA, initially opposed entry of the decree. The District Court granted a number of interested parties leave to intervene for the purpose of commenting on the proposed decree. They included a group of former National Airlines pilots,[3] a group of former National Airlines flight engineers, a group of furloughed Pan Am pilots, and six former Pan Am pilots who had been retired under the challenged policy. The objections of the first three groups focused on the injunctive relief provided by the proposed consent decree.[4] Contending that the decree provided inadequate monetary relief, the six former pilots objected to its entry. Stating that the law was uncertain, the District Court denied the joint motion to enter the

---

[3] Pan Am and National Airlines merged in January, 1980. The bidding systems of the two airlines differed in a number of respects. The parties submitted the disputes about the merger of the Pan Am and National seniority lists to arbitration. The arbitrator's award concluded that former National airmen would not possess the same rights as Pan Am airmen (A 8, 12).

[4] The former national pilots and flight engineers strongly argued that Pan Am did *not* violate the ADEA and that the injunctive relief provided by the decree would unjustifiably affect their less senior members by allowing more senior pilots to have priority for flight engineer positions, which could require furlough of their members (A 8, 30-31). The group of Pan Am furloughees claimed that the injunctive relief required payment of pension benefits in violation of the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* (1982) (A 8, 31-32).

consent decree. *See* 34 Fair Empl. Prac. Cas. (BNA) 321, 323 (N.D. Cal. 1984).[5]

2. Second Proposed Consent Decree

In July, 1985, Pan Am and the EEOC filed a joint motion to enter a second proposed decree that would resolve this litigation (A 8, 13-14). The second decree, as the first one did, provides for injunctive relief and an opportunity for former pilots who desire to do so to return to Pan Am as flight engineers. The new decree provides for substantially greater monetary relief, which would be apportioned to the claimants somewhat differently than in the first decree. Under the second decree, Pan Am would pay the former pilots $1.5 million; Pan Am would pay $750,000.00 immediately upon entry of the decree, and $375,000.00 on the first and second anniversaries of the entry of the decree. The amount paid to each former pilot would be directly proportional to the length of time since retirement so that those who have been retired the longest would receive the most money.

ALPA signed the new proposed consent decree and FEIA, which initially objected to a few of its terms, later withdrew its objections. The former National airmen and the Pan Am furloughees again opposed the decree on the grounds of the effect that the decree's injunctive relief would have on them. The

---

[5] The court noted that this Court had granted *certiorari* in *Airline Pilots Association, International v. Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983), *cert. granted sub nom. Trans World Airlines, Inc. v. Thurston*, 465 U.S. 1097 (1984), and might clarify the law. Pan Am filed a notice of appeal with the Ninth Circuit to appeal the District Court order denying the joint motion to enter the consent decree. In January, 1985, this Court decided *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S. Ct. 613 (1985), which affirmed in part and reversed in part the Second Circuit's decision. In light of that decision, Pan Am requested the Ninth Circuit to remand the case to the District Court for the limited purpose of entering the proposed consent decree or a modification thereof. After the EEOC and Pan Am submitted a new consent decree to the District Court, Pan Am dismissed the appeal.

former Pan Am pilots[6] again objected to the decree primarily on the ground that, in light of this Court's decisions in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 105 S. Ct. 613 (1985) and *Western Air Lines, Inc. v. Criswell*, 105 S. Ct. 2743 (1985), it provided them with inadequate monetary relief.[7]

B. District Court Decision

After a hearing, the District Court issued an opinion on October 22, 1985 refusing to enter the proposed consent decree. Even though this is an action brought by a federal agency rather than a class of private parties, the Court applied the standard of review required by Federal Rule of Civil Procedure 23 and rigorously scrutinized the fairness of the proposed decree. Utilizing that standard, the District Court held that the $1.5 million award to the former Pan Am pilots was inadequate and refused to enter the decree proposed by the parties (A 8). The District Court rejected the argument that, by virtue of Section 7(c)(1) of the ADEA, 29 U.S.C. § 626(c)(1), which terminates the right of any person to bring an ADEA action once the EEOC has commenced an action, Congress conferred broad discretion upon the agency to determine the appropriate amount of monetary relief to be provided by a settlement.

---

[6] Although only six opposed the first decree, 45 of the 81 former pilots ultimately opposed the entry of the second decree (A 8).

[7] Despite the former pilot's claims, both *Thurston* and *Criswell* are readily distinguishable from this case. TWA allowed pilots to displace flight engineers in *every* other instance except those who had reached age 60. *See Thurston*, 105 S. Ct. at 621. Pan Am did not. Similarly, in *Criswell*, Western's defense to its policy of mandatory retirement of *all* cockpit crew members, including flight engineers, who reached age 60, was that age itself was a " 'bona fide occupational qualification' reasonably necessary to the safe operation of the airline." *Criswell*, 105 S. Ct. at 2747. Western never asserted the safety defense that Pan Am would present to a jury at trial in this case.

C. Court of Appeals Decision

Pan Am appealed the District Court's refusal to enter the consent decree jointly proposed by the EEOC and Pan Am.[8] Pan Am asserted that the Court of Appeals had jurisdiction over the appeal of the District Court order under 28 U.S.C. § 1292(a)(1) as interpreted by this Court in *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981), and under 28 U.S.C. § 1291 as a collateral order. The Ninth Circuit in a *per curiam* opinion distinguished *Carson* and held that it lacked jurisdiction over the appeal under Section 1292(a)(1). The court also held that, in light of *Carson*, its previous decision holding that a defendant could appeal the District Court's refusal to enter a consent decree as a collateral order under 28 U.S.C. § 1291 was no longer good law. The court dismissed the appeal for lack of jurisdiction and did not reach the merits of Pan Am's appeal (A 1).

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

A. This Case Presents Significant and Important Issues Concerning the Appealability Under 28 U.S.C. § 1292(a)(1) of Orders Refusing to Enter Consent Decrees Jointly Sought By Plaintiff and Defendant.

In *Carson v. American Brands, Inc.*, 450 U.S. 79, 80 (1981), this Court decided the question "whether an interlocutory order of the District Court denying a joint motion of the parties to enter

---

[8] On appeal, Pan Am contended that the EEOC's action against Pan Am is not a class action under Federal Rule of Civil Procedure 23 and that the District Court should have deferred to the EEOC's exercise of the discretion delegated by Congress in the ADEA to settle this action. The only two courts to have addressed this precise question have adopted that position. *EEOC v. Consolidated Edison Co.*, 557 F. Supp. 468 (S.D.N.Y. 1983); *EEOC v. Eastern Air Lines, Inc.*, 97 F.R.D. 646 (S.D.Fla. 1983), *appeal dismissed*, 736 F.2d 635 (11th Cir. 1984). In the alternative, Pan Am contended that the District Court erred in its evaluation of the strength of the EEOC's case on the merits of its ADEA claims and thus in its evaluation of the fairness of the $1.5 million monetary award.

a consent decree containing injunctive relief is an appealable order," and held that such an order is appealable under 28 U.S.C. § 1292(a)(1). In this case, by holding that *Carson* applies only when *plaintiffs* appeal from denial of entry of a jointly sought consent decree and by limiting *Carson* to its specific facts, the Ninth Circuit's *per curiam* opinion drastically limits the scope of that decision. As a direct result, only plaintiffs will be allowed to appeal from joint motions to settle cases with consent decrees in the Ninth Circuit. The Ninth Circuit's decision therefore conflicts with the holding of this Court in *Carson* and the reasoning of the Seventh Circuit in *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985).

In *Carson*, a class of black employees alleged that the employer and the collective bargaining representatives discriminated against them in hiring, promotion, transfer, and training opportunities in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.* and sought declaratory and injunctive relief and monetary damages. After extensive discovery, the parties negotiated a settlement and jointly moved the District Court to enter a consent decree. The District Court denied the joint motion. *Carson v. American Brands, Inc.*, 446 F. Supp. 780 (E.D. Va. 1977). On appeal, the Court of Appeals for the Fourth Circuit, sitting *en banc*, dismissed the appeal for want of jurisdiction. 606 F.2d 420 (4th Cir. 1979) (en banc). The Fourth Circuit held that the District Court's refusal to enter the consent decree was neither an interlocutory order refusing an injunction under 28 U.S.C. § 1292(a)(1) or a collateral order under 28 U.S.C. § 1291.

This Court noted the conflict between decisions of the Courts of Appeals on the issue of the appealability of a District Court's order denying a motion to enter a consent decree and granted *certiorari*. *See Carson*, 450 U.S. at 82-83 n.6.[9] Resolving the

---

[9] One case cited by the Court in illustrating that conflict was In re *International House of Pancakes Franchise Litigation*, 487 F.2d 303 (8th Cir. 1973). In that case, the Court of Appeals for the Eighth Circuit, without a discussion of the question, asserted jurisdiction over the *defendant's* appeal of the District Court's refusal to enter a consent

conflict in favor of appellate jurisdiction, this Court reversed the Fourth Circuit's decision and held that the order was appealable under Section 1292(a)(1).[10]

Perhaps the most significant reason for the Court's holding in *Carson* was the plain fact that, absent immediate appeal, the litigants would be deprived of the opportunity to settle the case on the mutually agreed upon terms. *See Carson*, 450 U.S. at 86. The District Court's order therefore undermined the "strong preference for encouraging voluntary settlement of employment discrimination claims." *Id.* at 88 n.14.

In reaching the conclusion that the District Court's order was appealable, the Court recognized the value of consent decrees to the parties to an action:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. *The parties waive the right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation.* Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties give up something they might have won had they proceeded with the litigation.

Id. at 86-87 (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); emphasis added).

---

decree proposed by the parties. The Ninth Circuit's decision in this case squarely conflicts with the Eighth Circuit's decision in *International House of Pancakes*. Assuming that the issue was not resolved in *Carson*, this Court could address the conflict on this recurring question at this time. *See* Supreme Court Rule 17.1(a).

[10] Holding that the order was appealable under § 1292(a)(1), the Court found it unnecessary to decide whether the order was also appealable under 28 U.S.C. § 1291. *See* 450 U.S. at 83 n.7; *see also* discussion *infra* at pp. 18-21.

1. The Ninth Circuit's Decision Conflicts with this Court's Holding in *Carson v. American Brands*, with the Eighth Circuit's Decision in *International House of Pancakes Litigation*, and with the reasoning of the Seventh Circuit in *Donovan v. Robbins*.

As the plaintiffs did in *Carson*, Pan Am sought to appeal the District Court's denial of a joint motion to approve a proposed consent decree containing injunctive and monetary relief that would have settled an employment discrimination action. Nonetheless, the Ninth Circuit distinguished *Carson* and held that it lacked jurisdiction over the appeal. The court did so on the grounds that, in *Carson*, the *plaintiffs* sought to appeal the District Court's order while, here, *Pan Am, the defendant*, sought to appeal the District Court's order. The Ninth Circuit's reliance on that distinction conflicts with this Court's analysis in *Carson*.

The reasoning of *Carson* applies squarely to this case. *First*, the District Court's order truly denies Pan Am injunctive relief including (1) the settlement of this case on the terms set forth in the consent decree, thereby relieving it of the threat of ADEA liability for its cockpit crew policy, *and* (2) amending its collective bargaining agreements so that it does not risk liability for settling the case. The settlement of this case on the terms agreed upon by the parties is a form of injunctive relief that flows directly to Pan Am—relief denied as a result of the District Court's order. In addition, without modification of the collective bargaining agreements, Pan Am would risk actions by the bargaining representatives for breach of the collective bargaining agreements. *See W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757 (1983) (holding that employee may recover under collective bargaining agreement for injury caused by company's unilateral settlement of employment discrimination action with EEOC). *Second*, Pan Am, like the plaintiffs in *Carson*, might suffer "serious, perhaps irreparable, consequence" unless allowed to appeal the District Court's denial of the joint motion to enter the consent decree. Because Pan Am (and the EEOC) have been denied a settlement upon the terms to which they have agreed, they each may have to bear "the time, expense and inevitable risk of litigation" that might well be

avoided through settlement; at the same time, Pan Am will be denied the opportunity and "right to compromise [the] dispute on mutually agreeable terms." *Carson*, 450 U.S. at 88 (footnote omitted). Finally, for the reasons set forth in *Carson*, *see* 450 U.S. at 88 & n.14, the District Court's order can only effectively be challenged by immediate appeal.

The "serious, perhaps irreparable, consequence" that Pan Am will suffer if it is denied immediate appeal of the District Court order is exemplified by the tortuous procedural history of *Santana v. Collazo*, 714 F.2d 1172 (1st Cir. 1983), *cert. denied*, 466 U.S. 974 (1984). Plaintiffs in that action had negotiated *three* proposed consent decrees, all rejected by the District Court. On each occasion, the Court of Appeals for the First Circuit, without the guidance of this Court's decision in *Carson*, dismissed the appeals of the orders for lack of jurisdiction. The case ultimately proceeded to trial. On appeal after adjudication of the merits at trial, the First Circuit found it impossible to evaluate the terms of the consent decrees:

> *In this case, defendants have withdrawn their consent to the proposed settlement.* Moreover, having the evidence presented at the trial before us, and the benefit of the district court's assessment of that evidence, it would be difficult for us now to "judge the fairness of [the] proposed compromise by weighing the plaintiff[s'] likelihood of a success on the merits against the amount and form of the relief offered in the settlement." . . . *Finally, while public policy favors the enforcement of an amicable settlement of litigation without trial . . . , it is now too late to avoid the time and expense of trial.* Rather than seeking to return to the situation as it existed before the parties and the court invested a year and a half in a trial, we think it wiser to return to the merits of the issues presented to and reviewed by the district court and which formed the basis of its detailed findings.

714 F.2d at 1175 (citations omitted; emphasis added).[11]

a. The District Court Order Denied Pan Am Injunctive Relief.

The Ninth Circuit first distinguished *Carson* on the ground that Pan Am, unlike the plaintiffs in *Carson*, had not been denied an injunction. The Ninth Circuit stated that *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976)[12] held that "jurisdiction lies under Section 1292(a)(1) only if the party *taking the appeal* was denied injunctive relief." (A 1, 4) (emphasis in original).[13] *Liberty Mutual*, which held that an interlocutory order was not appealable under 28 U.S.C. § 1291, is readily distinguishable from this case. The District Court in *Liberty Mutual* had granted a motion for partial summary judgment for the plaintiff on liability *but had not granted any relief. See Liberty Mutual*, 424 U.S. at 742.[14] Because the issue of relief was not before the Court,

---

[11] *See* 16 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE: CIVIL § 3924, at 48 (Supp. 1986) (stating that *Santana v. Collazo* "graphically illustrate[s]" the risk of losing a settlement because of the appellate court's refusal to exercise jurisdiction over the appeal of a District Court order refusing to enter a consent decree).

[12] This Court in *Carson* did not mention *Liberty Mutual* as a limitation on its holding.

[13] The Ninth Circuit apparently was referring to the following dicta in *Liberty Mutual*:

> [i]f the District Court had granted injunctive relief but had not ruled on respondent's other request for relief, this interlocutory order would have been appealable under § 1292(a)(1). But . . . the court did not issue an injunction. It might be argued that the order of the District Court, insofar as it failed to include the injunctive relief requested by respondents, is an interlocutory order refusing an injunction within the meaning of § 1292(a)(1). But even if this would have allowed *respondents* to then obtain review in the Court of Appeals, there was no denial of any injunction sought by *petitioner* and it could not avail itself of that grant of jurisdiction.

424 U.S. at 744-45 (emphasis in original).

[14] Plaintiffs "received none of the relief which they expressly prayed for . . . . They requested an injunction, but did not get one; they re-

the exercise of appellate jurisdiction could *not* have finally resolved the case; even if the Court had exercised jurisdiction, piecemeal appeals were a reasonable possibility, if not a probability. Given these facts, this Court held that the defendant could not appeal a partial summary judgment order on the issue of liability.

In this case, by refusing to enter the decree, the District Court in fact denied the injunctive relief sought by *both* Pan Am and the EEOC. *See Carson v. American Brands, Inc.*, 606 F.2d 420, 425, 429 (4th Cir. 1979) (en banc) (Winter, J., dissenting) (distinguishing *Liberty Mutual* on similar grounds), *rev'd*, *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981). Moreover, Pan Am is denied the injunctive relief provided by the consent decree: an end to this litigation and a shield to future ADEA liability for its former cockpit crew policy. Finally, the plain fact that Pan Am will *never* be able to appeal the District Court order, if denied this opportunity, outweighs the policy against piecemeal review. By reviewing the District Court order, the Ninth Circuit could have finally resolved this action.

The Ninth Circuit also rejected Pan Am's argument that it was denied injunctive relief because the proposed consent decree would have amended the collective bargaining agreements with ALPA and FEIA in accordance with the injunctive relief granted to the EEOC, on the grounds that it was only " 'secondary' injunctive relief." (A 1, 4-5). However, such relief is necessary so that Pan Am may assure itself that it will not be liable if it complies with the consent decree. *See W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757 (1983). Accordingly, Pan Am was denied not one, but two, forms of injunctive relief.

b. The District Court Order Will Cause Pan Am "Serious, Perhaps Irreparable, Consequence."

The Ninth Circuit also found that Pan Am failed to establish the "serious, perhaps irreparable, consequence" required by *Carson*. The court distinguished *Carson* on the ground that, absent a

---

quested damages, but were not awarded any; they requested attorneys' fees, but received none." 424 U.S. at 742.

showing of actual past discrimination, the District Court in that case refused to approve *any* remedial relief, thereby forcing the case to trial. In this case, the Ninth Circuit stated that the District Court's "opinion focuses primarily on the inadequacy of the monetary settlement." (A 1, 6) (citation omitted).

Even though the District Court's primary objection was with the $1.5 million monetary award, that should not foreclose Pan Am from appealing the order, which effectively deprives it of injunctive relief. In *Donovan v. Robbins*, 752 F.2d 1170 (7th Cir. 1985) (Posner, J.), the Court of Appeals for the Seventh Circuit held that it had jurisdiction under Section 1292(a)(1) over the appeal of a District Court order that refused to approve a consent decree containing both injunctive and monetary relief on the basis that the monetary award was insufficient.[15] As in *Donovan v. Robbins*, the District Court's objection to the monetary relief effectively precludes entry of the decree that provides for extensive injunctive relief. The Ninth Circuit's reasoning therefore conflicts with that of the Seventh Circuit. *See* Supreme Court Rule 17.1(a).

The reasoning of the District Court does not change the fact that it denied Pan Am injunctive relief that will result in "serious, perhaps irreparable, consequence." Pan Am will be forever foreclosed from settling on the terms provided for in the consent decree and forced to trial. Moreover, the fact that Pan Am might offer more money does not change the fact that *this* settlement is forever lost. In *Carson*, the defendant conceivably could have conceded "actual past discrimination" and settled the case. This case is no different in principle.

c. The District Court Order Can Only Be Effectively Challenged By Immediate Appeal.

Having concluded that Pan Am had not been denied an injunction or established "serious, perhaps irreparable, conse-

---

[15] *See also Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982) (holding that joint appeal of District Court order refusing to enter a consent decree in a Title VII action was appealable even though the refusal was based on the monetary award to the class representatives).

quence," the Ninth Circuit did not decide whether the District Court order was one that Pan Am could only effectively challenge by immediate appeal (A 1, 6 n.6). As set forth in *Carson*, that requirement is readily satisfied. Without immediate appeal, Pan Am will be forever denied the right effectively to challenge the District Court's order. After trial, an appellate court, as a practical matter (as exemplified by *Santana v. Collazo*), cannot effectively review a settlement agreement reached long ago before the facts were adduced at trial and the uncertain legal questions answered. Accordingly, absent immediate appeal, Pan Am will lose the opportunity to settle on the mutually agreed upon terms in the consent decree.

2. The Ninth Circuit's Holding Runs Afoul of the Strong Policy Favoring Voluntary Settlement of Employment Discrimination Actions.

Both Congress and the courts have endorsed the overriding policy favoring voluntary settlement of employment discrimination actions.[16] *See, e.g., Local No. 93, International Association of Firefighters v. City of Cleveland,* 106 S. Ct. 3063, 3072-73 (1986) ("[W]e have on numerous occasions recognized that Congress intended for voluntary compliance to be the preferred means of achieving the objectives of Title VII."; citing cases); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974).[17] To facilitate voluntary compliance, the ADEA requires the EEOC, upon receipt of a charge that an employer or labor organization has violated the ADEA, to "promptly notify all persons named in such charge as prospective defendants in the action and *shall*

---

[16] For that reason, consent decrees are the rule rather than the exception in employment discrimination actions brought by the EEOC. In fiscal year 1983, the EEOC's district offices entered consent decrees in twice as many cases (94) as it took to trial (47). EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 18TH ANNUAL REPORT, 31 (1985).

[17] *See also* 29 C.F.R. § 1608.1(b) (1985) (In enacting Title VII, "Congress strongly encouraged employers . . . to act on a voluntary basis to modify employment practices in systems which constituted barriers to equal employment opportunity.").

promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion." 29 U.S.C. § 626(d) (emphasis added); *see* 29 C.F.R. § 1626.12 (1985).[18]

In *Local No. 93 v. City of Cleveland*, 106 S. Ct. at 3073, this Court reiterated the basis for its holding in *Carson*: "a District Court's order denying entry of a consent decree is appealable under 28 U.S.C. § 1292(a)(1) *because such an order undermines Congress' 'strong preference for encouraging voluntary settlement of employment discrimination claims.'* " (citation omitted; emphasis added). The Ninth Circuit's decision undercuts the policy favoring voluntary settlement of employment discrimination actions. As set forth *supra*, only through immediate appeal of the District Court's refusal to enter a consent decree can the parties hope to settle an action on those terms. Once the district court disapproves a proposed decree, there is no alternative but to change the terms of the decree or proceed to trial—even if the district court commits grievous error in refusing to enter the proposed decree. That result encourages *litigation*, not *settlement*, of matters that could, and for the benefit of all involved, should be resolved through voluntary compliance. By forcing the litigation of claims that have been settled to the satisfaction of the parties, both private and judicial resources are wasted.

3. Conclusion

The reasons offered by the Ninth Circuit for distinguishing *Carson* are unpersuasive. The balance of advantages of asserting jurisdiction against the costs of piecemeal appeals, weighs decidedly in favor of permitting appeals by the defendant, as well as the plaintiff, when a District Court refuses to enter a consent decree

---

[18] *See also* House Report No. 805, 90th Cong., 1st Sess. (1967), *reprinted* in 1967 U.S. CODE CONG. & AD. NEWS 2213, 2218 (stating that the EEOC's enforcement responsibility is intended to "be initially and exhaustively directed through informal methods of conciliation, conference, and persuasion and formal methods applied only in the ultimate sense").

containing both injunctive and monetary relief.[19] *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (Among "the considerations that always compete in the question of appealability, the most important . . . are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."; citations omitted). Moreover, the Ninth Circuit's holding creates an anomalous and inequitable situation unprecedented in any other area of the law: *only the plaintiff in an employment discrimination action may appeal a District Court order disapproving a consent decree proposed by both the plaintiff and defendant.* The parties besides the plaintiff with vital interests at stake in immediate resolution of the dispute, including the employer and labor organizations, cannot appeal the same order. Employers and labor organizations—the most likely defendants in an employment discrimination action—are left no recourse if a District Court disapproves the proposed settlement. Plaintiffs may appeal but also may

---

[19] As one commentator has observed:

> [t]o mitigate the harshness and occasional absurdity of inflexible insistence on finality in all situations, Congress and the courts have developed certain exceptions to the finality requirement. Moreover, because the final judgment rule and its preexisting exceptions have not always been sufficient to assure fairness to appellants, the courts have at times allowed appeals of orders that neither fit within the terms of any of the established exceptions nor meet the technical requirements of finality. The Courts have applied a pragmatic approach to appealability in these situations. *In the words of the Supreme Court, among "the considerations that always compete in the question of appealability, the most important . . . are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other."* This balancing of the competing needs for judicial economy represents the Court's recognition that "[a] pragmatic approach to the question of finality has been considered essential to the achievement of the just, speedy, and inexpensive determination of every action.' " or, as the Court has also phrased it, "the requirement of finality is to be given a 'practical rather than a technical construction.' "

Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 90-91 (1975) (emphasis added).

employ the District Court's order as a lever in further settlement negotiations. Such a bargaining chip greatly favors the plaintiff at the expense of the employer, the labor organization, and others, including employees, affected by a proposed settlement.

The Court of Appeals for the Ninth Circuit has erroneously "decided an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 17.1(c). This Court therefore should grant the petition for writ of *certiorari*.

B. This Case Presents a Significant and Important Issue Concerning the Appealability Under 28 U.S.C. § 1291 of Orders Refusing to Enter Consent Decrees On Which There is a Clear Conflict Among the Circuits.

Pan Am also invoked appellate jurisdiction over the District Court's order as a "collateral order" under 28 U.S.C. § 1291. Section 1291 provides that the Courts of Appeals has jurisdiction "of appeals from all final decisions of the District Courts of the United States." In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), this Court created a route for appeal of important District Court orders that do not constitute a final judgment but

> which finally determine claims of *right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.* The Court has long given this provision of the statute this practical rather than a technical construction.

(citing *Bank of Columbia v. Sweeney*, 26 U.S. (1 Pet.) 567, 569 (1828); *United States v. River Rouge Improvement Co.*, 269 U.S. 411, 414 (1926); *Cobbledick v. United States*, 309 U.S. 323, 328 (1940); emphasis added). This Court's recent decisions have reaffirmed the formulation of the collateral order doctrine set forth in *Cohen*. *See, e.g., Richardson-Merrell, Inc. v. Koller*, 105 S. Ct. 2757 (1985); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981).

In *Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970), *cert. denied sub nom. Isi v. Myers*, 401 U.S. 912 (1971), the Court of Appeals for the Ninth Circuit applied *Cohen* and held that a defendant could appeal the District Court's refusal to enter a proposed consent decree. As the court reasoned,

> [i]t seems clear in this case that the order disapproving the proposed settlement is a collateral order. The proposed settlement is independent of the merits of the case. It would not merge in final judgment. Disapproval of the settlement is not a step toward final disposition and is not in any sense an ingredient of the cause of action. *In itself, the district judge's order is final on the question whether the proposed settlement should be given judicial approval.*

Id. at 773 (emphasis added). The court then balanced " 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice for delay on the other.' " *Id.* at 774 (quoting *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)). After considering the complex questions raised in the action and the cost of a lengthy and expensive trial, the court concluded that the costs of piecemeal review were minimal and outweighed by the danger of denying justice by delay. *Norman v. McKee*, 431 F.2d at 774.

The Court of Appeals for the Second Circuit reached a result contrary to *Norman v. McKee* in *Seigal v. Merrick*, 590 F.2d 35 (2d Cir. 1978). Reading this Court's decision in *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978),[20] as suggesting that the collateral order doctrine be read narrowly, the Second Circuit held that an order disapproving a settlement was not appealable as a collateral order. The court reasoned that "[s]uch an order is based, in part, upon an assessment of the merit of the positions of the respective parties, and permits the parties to proceed with the

---

[20] *In Coopers & Lybrand v. Livesay*, this Court held that a District Court order denying a motion for class certification was not appealable as a collateral order. As this Court recognized, "an order denying class certification is subject to effective review after final judgment." 437 U.S. at 469 (citation omitted).

litigation or to propose a different settlement." *Seigal v. Merrick*, 590 F.2d at 37. In holding that the District Court's order was not appealable under Section 1291, the Second Circuit recognized that its decision conflicted with the Ninth Circuit's decision in *Norman v. McKee*. *See Seigal v. Merrick*, 590 F.2d at 39.

In *Carson v. American Brands, Inc.*, this Court noted the conflict between *Norman v. McKee* and *Seigal v. Merrick*. *Carson*, 450 U.S. at 82-83 n.6. However, having decided that the District Court order denying the joint motion to enter the consent decree *was* appealable under Section 1292(a)(1), the Court found it unnecessary to, and expressly did not, decide whether the order was appealable under Section 1291. *See* 450 U.S. at 83 n.7. Accordingly, the Court did not resolve the conflict between *Norman* and *Seigal*. If this Court concludes that Pan Am cannot appeal the District Court's order under Section 1292(a)(1), then it should grant *certiorari* in order to resolve the conflict between the Circuits on this recurring question of federal law.

For the reasons set forth in *Norman v. McKee*, the District Court's order should be treated as a collateral order and appealable under Section 1291. The issue whether the proposed consent decree should be approved "finally determine[s] claims of rights separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. As the Second Circuit recognized in *Seigal*, the parties naturally consider the merits and risks of litigation in deciding whether to settle an action. That alone, however, does not mean that the rejection of the decree by the District Court is not a collateral order. After a trial of the merits, the propriety of the terms of the proposed decree cannot properly be evaluated in light of the litigation risks. After trial, the risks sought to be avoided have come to pass, at least for one of the parties, and the victorious litigant quite rationally will not compromise on the terms of the previously agreed-upon consent decree. Thus, the ability to settle on those terms is forever lost if a party is not allowed to appeal an order disapproving the proposed decree. Finally, the fact that the order cannot be appealed and that the District Court's refusal to

enter a proposed decree is contrary to the policy favoring voluntary settlement of employment discrimination actions, vastly outweigh any inconvenience caused by piecemeal review. *See supra* pp. 15-17.

Here, the Ninth Circuit acknowledged that *Norman v. McKee* is no different from this case (A 1, 6-7 n.7). The court, however, held that *Norman* was no longer "good law" in light of this Court's decision in *Carson*. In the words of the Ninth Circuit, "*Carson* was intended to provide a definitive basis and standard for such interlocutory appeals, and thus overrules *Norman v. McKee*'s reliance on Section 1291." (A 7 n.7). However, Sections 1291 and 1292(a)(1) are independent bases for appellate jurisdiction. For that reason, this Court has treated jurisdiction under Section 1292(a)(1) and Section 1291 separately and, even when finding that appellate jurisdiction was lacking over a certain category of appeals under one statute, it has evaluated the propriety of jurisdiction under the other statute. *See Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) (holding that the denial of a motion for class certification was not appealable under Section 1292(a)(1) by petitioner seeking injunctive relief); *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) (holding that denial of motion for class certification was not appealable as a collateral order under Section 1291). Instead of treating the statutes separately, the Ninth Circuit read a holding into *Carson* that simply is not there. Because Section 1291 is an independent basis for appellate jurisdiction, the Ninth Circuit should have squarely addressed the question whether jurisdiction was appropriate under that section.

This Court should resolve this conflict between the Circuits on a significant and important issue of federal law that will continue to affect the settlement of numerous employment discrimination actions. *See* Supreme Court Rule 17.1(a).

CONCLUSION

For the foregoing reasons, petitioner Pan American World Airways, Inc. respectfully requests that this Court grant the petition for writ of *certiorari*.

Dated: September 26, 1986.

Respectfully submitted,

HELLER, EHRMAN, WHITE & MCAULIFFE

By ROBERT S. VENNING
Counsel for Petitioner

Appendix A

For Publication

United States Court of Appeals
for the Ninth Circuit

No. 85-2840
DC No. C-81-3636 RFP

Equal Employment Opportunity Commission
Plaintiff-Appellee,

v.

Pan American World Airways, Inc.,
Defendant-Appellant.

And Related Cross and Third Party Actions

Appeal from the United States District Court
for the Northern District of California
Robert F. Peckham, District Judge, Presiding
Argued and Submitted July 17, 1986
San Francisco, California

OPINION

[Filed Aug. 8, 1986]

Before: Choy, Hug and Wiggins, Circuit Judges
Per Curiam.

Pan American World Airways, Inc. (Pan Am) appeals from a district court order disapproving a proposed consent decree between Pan Am and the Equal Employment Opportunity Commission (EEOC) that would have settled an EEOC suit claiming age discrimination in Pan Am's employment policies involving pilots and flight engineers. We conclude that we have no jurisdiction and dismiss.

FACTS AND PROCEEDINGS BELOW

EEOC filed an action against Pan Am alleging violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 626(b), by Pan Am's refusal to employ persons between the ages of 60 and 70 as flight engineers.[1] Pan Am filed additional pleadings bringing the two unions involved, the Airline Pilots Association (ALPA) and the Flight Engineers International Association (FEIA), into the action so as to bind them in case the district court decree required modification of Pan Am's collective bargaining agreements with them.

In May 1983, Pan Am and the EEOC reached a settlement agreement under which Pan Am would allow flight engineers to work until age seventy and would allow pilots who had been forcibly retired to return and retrain as flight engineers if they wished.[2] Pan Am also agreed to pay those forcibly-retired employees who elected not to return equal shares of a total of $250,000 single payment. The settlement also provided a procedure allowing pilots reaching the age of sixty in the future to "bump" more junior flight engineers.

This settlement was agreed to by Pan Am and the EEOC and, after some modification, by the ALPA and the FEIA. The settlement was opposed by six individual claimants and the National Airline Chapter of FEIA (NAL-FEIA).[3] The district

---

[1] Because we conclude we have no jurisdiction over the appeal, we need not detail the specifics of the Pan Am employment policies and the EEOC's objections to them. The merits of the case generally revolve around the permissibility of forbidding pilots who reach the (FAA-mandated) retirement age of 60 to "bump" flight engineers with less seniority and assume their jobs, which are not age-regulated by the FAA.

[2] This continued employment or reemployment was subject to the employee meeting the physical and skills requirement of the job.

[3] The NAL-FEIA is an independent unit within the FEIA that exists as a result of the merger between Pan Am and National Airlines (NAL). The employment structures of pilots and flight engineers for the two airlines differed markedly, and employees of the present Pan Am are treated differently in some respects depending on which airline

court (Ingram, J.) refused to enter this proposed consent decree on the ground that the law in this area of the ADEA was uncertain and noted that the Supreme Court had granted certiorari in a case on a similar issue. *E.E.O.C. v. Pan American World Airways*, 34 Fair Emp. Prac. Cas. (BNA) 321 (N.D. Cal. 1984). The court also denied Pan Am's motion for reconsideration of the refusal.

Pan Am appealed the denial of its motion to enter the proposed consent decree but sought and received a limited remand after the Supreme Court's decision in *Trans World Airlines, Inc. v. Thurston*, 105 S. Ct. 613 (1985). Pan Am and the EEOC then proposed a new consent decree, increasing the payment total to $1.5 million, spreading the payment over three years without interest, broadening the coverage of the payments to include those who elect to return to work, and varying the amount each claimant receives according to the length of time since the individual's forced retirement. Pan Am, the EEOC, and the ALPA agreed to the new terms, and the FEIA offered no objections. The NAL-FEIA again objected, as did 45 of the 81 affected claimants.

In a thorough memorandum, the district court (Peckham, J.) disapproved the proposed revised consent decree. *See E.E.O.C. v. Pan American World Airways, Inc.*, 622 F. Supp. 633, 648-49 (N.D. Cal. 1985). Pan Am timely appeals.

APPELLATE JURISDICTION

Before we may reach the merits of this appeal, we must determine whether we have jurisdiction. *See Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1377 (9th Cir. 1985).

In its opening brief, Pan Am asserts that we have jurisdiction under 28 U.S.C. § 1292(a) (1982) because the district court

---

they worked for before the merger. The NAL-FEIA has therefore continued to exist to protect the distinct interests of the former NAL employees.

order denies injunctive relief.[4] The controlling case on this issue is *Carson v. American Brands, Inc.*, 450 U.S. 79 (1981). In *Carson*, the Supreme Court effectively set forth three requirements for determining whether an interlocutory order denying a joint motion for entry of a consent decree is an appealable order pursuant to section 1292(a)(1). First, the interlocutory order must have the practical effect of denying an injunction. *Id.* at 83-84. Second, the order must have "serious, perhaps irreparable, consequence." *Id.* at 84. Finally, the order must be one that can be "effectively challenged" only by immediate appeal. *Id.*

Pan Am fails to meet the "denial of injunction" requirement of *Carson*. Although the disapproved consent decree clearly involved injunctive relief (primarily the modification of Pan Am's cockpit staffing policies), that injunctive relief was sought by the *appellee* EEOC, not by *appellant* Pan Am. *See Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 744-45 (1976) (holding that jurisdiction lies under section 1292(a)(1) only if the party *taking the appeal* was denied injunctive relief).

Pan Am argues that it too was denied injunctive relief in that part of the proposed consent decree would have amended the current collective bargaining agreements with ALPA and FEIA in accordance with the relief granted to the EEOC. Without the "injunctive relief" of that amendment, Pan Am argues, it cannot change its present policies to satisfy the EEOC without risking lawsuits by the unions charging breach of the unions' contracts. *See, e.g., W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983) (holding that employee may recover under collective bargaining agreement for injury caused by company's unilateral settlement of civil rights case with EEOC). Pan Am joined ALPA and FEIA for the very purpose of binding them to the judgment in the case, and the disapproval of the consent decree,

---

[4] 28 U.S.C. § 1292(a) (1982) provides in relevant part:

> [T]he court of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States . . . or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . .

Pan Am argues, prevents that. In the meantime, Pan Am asserts, it faces a real risk of suit if it breaches the unions' contracts unilaterally and mounting back pay claims if it doesn't.

We note, however, that the amendments to the collective bargaining agreement sought by Pan Am are a kind of "secondary" injunctive relief, made necessary only by the relief granted to the EEOC and *against* Pan Am. Pan Am seeks no modification of the collective bargaining agreement beyond that specifically required by the EEOC's suit. Because the consent decree has not been approved, the EEOC has not yet been granted any injunctive relief, and Pan Am does not need any injunctive relief against the unions.

Moreover, Pan Am's dilemma is at least partly speculative. Even if the denial of the current consent decree stands, the eventual revised decree or final judgment after trial might not require modifications in the collective bargaining agreement, the unions might not object to any changes that were made, or a successor collective bargaining agreement might be in effect that already takes into account the changes.[5] We thus conclude that disapproval of the consent decree in this case does not have the practical effect of denying Pan Am injunctive relief. *See Carson*, 450 U.S. at 83-84.

Pan Am also fails to meet the requirement of "serious, perhaps irreparable, injury." *See Carson*, 450 U.S. at 84. Pan Am claims that it, like the petitioner in *Carson* is being denied the right to settle the suit on mutually agreeable terms. In *Carson*, however, the disapproval of the consent decree effectively forced the parties to trial. The district court in *Carson* refused to approve *any* remedial relief without a showing of actual past discrimination, a charge that the defendants continued to deny, and even then the court would grant only to actual victims of that past discrimination. *See Carson*, 450 U.S. at 87 n.12. This refusal completely foreclosed any further settlement negotiations short of outright

---

[5] We note, for example, that Pan Am by its own admission changed its cockpit staffing policy in 1983, moving in the general direction of the policy urged by the EEOC, and the airline has apparently had no trouble with its unions as a result.

admission of discrimination by the defendants and complete restructuring of the class relief. *See id.*

In the present case, the district court's ground for disapproving the decree is not nearly so broad. The district court opinion focuses primarily on the inadequacy of the monetary settlement, and also mentions the strength of Pan Am's case and Pan Am's financial position. *See* 622 F. Supp. at 641-46. The opinion does not attack the underlying premise of the settlement (that Pan Am's previous policies violated the ADEA) nor the injunctive relief proposed by the parties (the modified policies and their binding force on the unions). The disapproval in no way inhibits further negotiations between the EEOC and Pan Am to meet the concerns raised. As a result, Pan Am is not being denied the right to settle the case on *any* mutually agreeable terms, as were the defendants in *Carson*; Pan Am is merely being denied the right to settle the case on the *particular* terms of the current proposed consent decree, which the district court found unreasonable. In light of this, Pan Am has not asserted a "serious, perhaps irreparable, harm" to itself from the disapproval of the decree.[6]

In summary, Pan Am fails to meet the requirements for interlocutory appeal set forth in *Carson*,[7] and its appeal is DISMISSED for lack of jurisdiction.

---

[6] Because Pan Am's appeal fails the first two requirements of the *Carson* test, we do not consider whether it meets the third requirement, that the order be one that can be effectively challenged only on immediate appeal.

[7] Pan Am also asserts jurisdiction pursuant to 28 U.S.C. § 1291, relying on the *Cohen* doctrine in general and *Norman v. McKee*, 431 F.2d 769, 772-74 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971), in particular. *Norman v. McKee* is indeed directly on point here, allowing defendants to appeal an order disapproving a consent decree that would have granted injunctive relief against them. The court reasoned that the consent decree was a collateral issue completely distinct from the merits of the case. *Id.* at 773.

Pan Am's reliance on *Norman*, however, fails in view of the Supreme Court's decision in *Carson*. *Carson* explicitly resolved a conflict among the circuits concerning whether and pursuant to what statute an interlocutory order disapproving a consent decree was appealable. The *Carson*

opinion specifically cites *Norman v. McKee* as one of the conflicting cases. *See Carson*, 450 U.S. at 82 & n.6. Although the Court in *Carson*, 450 U.S. at 83 n.7, stated that it need not decide whether the order was appealable under section 1291, we conclude from footnote 6 that *Carson* was clearly intended to provide a definitive basis and standard for such interlocutory appeals, and thus overrules *Norman v. McKee's* reliance on section 1291.

Appendix B

In the United States District Court
for the Northern District of California
No. C-81-3636-RFP

Equal Employment Opportunity Commission,
Plaintiff,

v.

Pan American World Airways, Inc., et al.,
Defendants.

and Related Cross and Third Party Actions.

Memorandum and Order
[Filed Oct. 22, 1985]

Introduction

On September 13, 1985, this court held a fairness hearing to consider objections to a proposed Consent Decree entered into between Pan Am and the EEOC. The Decree is designed to settle an action under the Age Discrimination in Employment Act of 1967 ("ADEA" or "Act"), 29 U.S.C. § 626 et. seq., brought by the EEOC against Pan Am. Pan Am and the EEOC (referred to jointly as "applicants") argue that the proposed Consent Decree fairly reflects the risks of litigation that the parties face.

Several parties have filed objections to the Consent Decree. Forty-five of the eighty-one former Pan Am pilots on whose behalf the EEOC brought this action object to the Decree as providing them with inadequate monetary relief. Most of the objectors (referred to collectively as "claimants") have filed declarations with the court. In addition, those Pan Am pilots and flight engineers who were employed by National Airlines before National and Pan Am merged in 1980 also object to the Decree. These engineers and pilots, in separate filings, argue that the Decree violates their rights as decided by an arbitrator after the merger. Finally, the intervenor Rankin contends that the Decreee violates the provisions of the Employee Retirement Income Security Act (ERISA).

FACTS

The following facts appear in the applicant's Joint Application for Entry of Consent Decree:

Pan Am's aircraft, with the exception of the Boeing 737, have a three person cockpit crew. The captain, or first seat, is in overall command of the aircraft. The first officer, also known as the second seat or copilot, is second in command and assumes the captain's responsibilities in case of his disablement. The flight engineer, or third seat, sits at his own instrument panel and primarily monitors the aircraft's operating systems. During normal operation, the engineer does not handle the flight controls. The Air Line Pilots Association (ALPA) represents the pilots, while the Flight Engineers International Association (FEIA) represents the flight engineers.

In 1962 and 1963, Pan Am and ALPA and FEIA entered into "Crew Complement Agreements" in response to the recommendation of a Presidential Commission that all cockpit crew members be qualified as pilots. These arrangements transformed the position of flight engineer in the entry level position for employment as a first officer or captain. Under these agreements, all newly hired flight engineers, called pilot/flight engineers, must possess pilot qualifications. Pilot/flight engineers were placed on the Pilot System Seniority List, entitling them to bid for first officer and pilot positions.

The agreements also protected employees then serving as flight engineers. Those employees, known as "Appendix A" or professional flight engineers, were given prior rights to all Pan Am engineer positions, as long as they obtained the necessary pilot qualifications. The agreements provided, however, that Appendix A flight engineers, unlike pilot/flight engineers, could not bid for pilot positions.

Pilots may also bid, or "downbid", for engineer positions. For example, pilots may bid for engineer vacancies that result from an overall increase in Pan Am's demand for engineers. In addition, pilots may displace, or "bump", engineers in lieu of furlough. In no instance, however, may a pilot displace an Appendix A engineer.

According to the applicants, these are the only circumstances under which the collective bargaining agreements permit a pilot to displace a flight engineer. Applicants admit that Pan Am, pursuant to an agreement with the ALPA and FEIA, permitted one pilot that lost his first-class medical certificate, required for all pilots by the Federal Aviation Administration (FAA), to continue to fly as a flight engineer after he obtained the second-class certificate required for flight engineers.

Treatment of Age 60 Airmen at Pan Am

Under the FAA's "Age 60 Rule", 14 C.F.R. § 121.383(c), pilots (including first officers) may not serve past the age of 60. This rule does not apply to flight engineers. Pan Am's pension plan, before 1978, provided for the retirement of both pilots and engineers at age 60.

In 1978, Congress amended the ADEA to provide that an employer could not retire its employees at a specified age based solely on a seniority system or pension plan. *See* 29 U.S.C. § 623 (f)(2). In response to the amendments, and after a review of its policies, Pan Am permitted its Appendix A flight engineers to fly past the age of 60. More than 70 Appendix A flight engineers have taken advantage of this new policy. Pan Am did not, however, change its treatment of pilots approaching age 60.

From the effective date of the ADEA amendments, April 6, 1978, until September 28, 1979, there were no flight engineer vacancies for which pilots were eligible to bid. Twenty-eight of the eighty-one claimants turned 60 before the award of the first engineer vacancy. Pan Am, with no opposition from the ALPA, interpreted its collective bargaining agreement to provide for the retirement of these 28 claimants with loss of seniority. Only one claimant, Raymond Russell, filed a grievance concerning this action. The Pan Am-ALPA System Board of Adjustment unanimously upheld Pan Am's interpretation of the collective bargaining agreement. Pan Am and the ALPA later explicitly provided for retirement with loss of seniority at age 60. Pan Am and the EEOC disagree as to whether this provision changed the contract or codified existing practices.

Pan Am bulletined 10 flight engineer vacancies for which pilots were eligible to bid on September 28, 1979. Four pilots, two of whom are claimants here, bid on these positions. To Pan Am's knowledge, no captain had ever before bid for a flight engineer position. (Applicants do not state whether first officers had ever bid for a flight engineer position.) After awarding positions to the pilots, Pan Am notified them that they would be retired at age 60 despite their job change.

Later in the Fall of 1979, Pan Am awarded engineer positions to three more pilots, two of whom are claimants here. The third pilot, Otto Kiehl, is not a claimant in this action. His separate lawsuit against Pan Am, *Kiehl v. Pan American World Airways, Inc.*, C-81-4274 (WAI), was consolidated with this case, but later settled separately. Pilot Joseph Hazelwood, who successfully bid for an engineer position bulletined in January, 1981, and was retired at age 60, joined in Kiehl's action. In January 1983, Pan Am agreed to reinstate both Kiehl and Hazelwood as flight engineers, provided they passed the required training. Both have served as flight engineers and may continue to do so until they reach the age of 70.

Applicants claim that they have located the bid forms of a total of 7 of the claimants, including those mentioned above. Applicants state that two other claimants maintain that they submitted bids. Therefore, according to applicants, only 9 claimants bid for engineer positions. Declarations submitted by the objecting claimants state that many other former pilots were deterred from applying because of Pan Am's well-known policy regarding the ability of 60 year old pilots to downbid.

On February 25, 1983, Pan Am changed its policy towards pilots approaching the age of 60. From that point forward, a pilot approaching 60 who was awarded a flight engineer vacancy and completed his training before the first of the month following his sixtieth birthday could remain as a flight engineer until the age of seventy. Pan Am has continued to retire pilots not meeting these criteria. According to the applicants, "a number of" pilots approaching the age of 60 have served as flight engineers.

The National-Pan Am Merger

The merger of National Airlines and Pan Am in January, 1980, complicates this matter. National Airlines, unlike Pan Am, did not permit pilots or engineers to bid for each other's positions. National kept these two job classifications entirely separate.

The two airlines submitted their dispute regarding the manner in which their seniority lists would be merged to arbitration. On March 12, 1981, Arbitrator Lewis Gill issued his resolution of this dispute. He held that former National airmen would continue not to have bidding rights for engineer positions; the arbitration award, therefore, preserved the differing labor structures of the two firms within Pan Am's overall labor structure.

Procedural Background

The EEOC filed this action against Pan Am in September 1981, alleging that Pan Am's policy towards its sixty year old pilots desiring to serve as flight engineers violated the ADEA. The EEOC sought back pay, liquidated damages, reinstatement, and injunctive and declaratory relief.

The EEOC asserted that Pan Am violated the ADEA by: (1) refusing to permit pilot/flight engineers to serve as flight engineers past the age of 60, (2) refusing to permit a fifty-nine or sixty year old pilot to displace a flight engineer in the absence of a flight engineer vacancy, and (3) forcing age sixty pilots to retire and forfeit their seniority.

Pan Am claimed that its actions were justified. Pan Am asserted that its policies were necessary to the essence of its business, which is the safe transportation of its passengers, and therefore was justified as a bona fide occupational qualification (BFOQ). Alternatively, Pan Am asserted that pilots approaching age sixty had no right under Pan Am's labor agreements to displace engineers and that pilots displaced by the FAA Age sixty rule need not be provided with another position. Pan Am also noted that few of the claimants bid for available Flight Engineer positions.

This case was originally scheduled for trial in April 1983. The parties filed cross motions for summary judgment that Judge Ingram denied at the pretrial conference. Pan Am's motion for summary judgment argued that its collective bargaining agreement, which prohibited pilots to transfer to a flight engineer position and serve past the age of sixty, constituted a bona fide seniority system.

Shortly after Judge Ingram denied the cross motions for summary judgment, the parties entered into a proposed consent decree. The decree provided for reinstatement of the claimants desiring to return to work, and monetary recovery in equal shares from a total of $250,000. After substantial briefing, negotiations, and modification of the decree, and a fairness hearing held on September 28, 1983, Judge Ingram disapproved the decree. *EEOC v. Pan Am World Airways*, 34 Fair Empl. Prac. Cas. (BNA) 321 (N.D.Cal. 1984). Judge Ingram based his decision on the uncertainty in the law in this area, noting that the Supreme Court had accepted *certiorari* in *ALPA v. TWA*, 713 F.2d 940 (2d Cir.), *cert. granted*, No. 83-997 (Feb. 27, 1984). In the interim, the case had been reassigned to this court. Judge Ingram denied reconsideration of his decision on April 19, 1984. Pan Am appealed both decisions, but has since stipulated to a dismissal of its appeals.

The Supreme Court issued its decision in *Trans World Airlines v. Thurston*, 105 S.Ct. 613 (1985), on January 8, 1985. Pan Am immediately requested the Ninth Circuit to remand the case to this court for the limited purpose of considering entering the proposed decree or a modification of it. The Ninth Circuit granted Pan Am's request on February 11, 1985. Applicants proposed the modified Decree that is the subject of this order on July 3, 1985.

The New Consent Decree

The Consent Decree proposes several changes in Pan Am's treatment of pilots and flight engineers. Under the agreement, Pan Am will permit all flight engineers to work until they reach the age of seventy. ¶ 3. In addition, all current Pan Am pilots on the Pilot System Seniority List that possess cross bidding rights (that is, all but the former National Airlines pilots) shall be

permitted to bid for flight engineer vacancies. ¶ 11. The Decree establishes a notice procedure under which pilots approaching retirement can indicate their interest in becoming engineers.

The Decree provides that Pan Am will pay claimants a total of $1,500,000 in three installments. The first installment, to be paid thirty days after Pan Am receives a form from the claimants releasing Pan Am from any liability relating to its policy towards pilots approaching the age of 60, will equal fifty percent of the total. Each of the next two years, Pan Am will pay an additional twenty-five percent of the total.

The Decree divides the payments among the claimants in the following way: First Pan Am will reimburse claimants for the costs of attending their depositions, as approved by the EEOC. Second, Pan Am will divide the remaining funds so that the share received by each claimant corresponds to the length of time the claimant has been retired. In other words, a claimant retired for twice as long as a second claimant would receive a payment twice as large.

The Decree permits the claimants to return to work as flight engineers as long as they can present the appropriate medical certificate and can pass the company physical. Pan Am will offer positions to at least eighteen of the claimants every three months beginning forty-five days after the entry of the Decree. Pan Am will offer these positions to claimants in their order of seniority, except that those claimants who submitted bid forms on Pan Am's approved form will be trained first.

DISCUSSION

Applicants primarily contend that uncertainties concerning the eventual outcome of litigation of this matter require approval of the proposed Decree. The EEOC also argues that the court must approve the Decree unless its provisions are illegal or grossly unreasonable. Furthermore, the EEOC claims that it is bound by its earlier agreement to the consent decree that Judge Ingram rejected, and that subsequent changes in the law do not permit it to alter its agreement with Pan Am.

The court has received objections from several parties. The objecting claimants argue that the Decree is unreasonable in light of the Supreme Court's recent cases involving age discrimination in the airline industry. They also assert that the EEOC has inadequately represented them. Finally, they contend that Pan Am's financial condition has improved recently; therefore, according to the claimants, applicants cannot justify inadequate monetary relief based on Pan Am's poor financial condition.

Both former National Airlines groups, the former pilots and the former flight engineers, have objected to the Decree. In general, they argue that the Decree interferes with the arbitration decision that integrated the two firms' different labor structures.

As a preliminary matter, the EEOC claims that it remains bound by the terms of the 1983 settlement agreement. It claims that a proposed consent decree is like any other contract, and can not be modified unilaterally. The EEOC claims that when Judge Ingram "erroneously" rejected the decree, in March 1984, the EEOC could either have appealed his action or gone to trial, but had no right to modify the decree. The EEOC contends that intervening case law, such as *Thurston*, cannot relieve it of its obligations under the agreement it reached with Pan Am. Indeed, the EEOC states that the only changes it made in the Decree compensated claimants for the salaries they lost from June 1984 to June 1985 when Pan Am appealed Judge Ingram's order, and do not reflect *Thurston*'s clarification of the law. (Claimants maintain that the Decree does not adequately compensate them even for this delay.)

There are several problems with the EEOC's argument. First, the Decree, itself, provides that parties can apply to the court "in the event of a change in facts or a change or *clarification*, judicial or otherwise, of the law." ¶ 13 (emphasis added). The EEOC has conceded that *Thurston* clarified the law. Therefore, the EEOC must be arguing that it could not seek to modify the Decree until after the court had approved it. This position seems completely anomalous.

Second, a consent decree, despite the EEOC's arguments, is not like any other contract. "The terms of the decree, unlike those

of a simple contract, have unique properties. A consent decree has attributes of both a contract and of a judicial act." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). *See also United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975) ("Consent decrees and orders have attributes both of contracts and of judicial decrees); 2 A. Larson & L. Larson, *Employment Discrimination*, § 56.23 (1985) (consent decree is a hybrid).

Third, Once Judge Ingram rejected the Decree, and especially after the Ninth Circuit remanded the matter, the parties were free to renegotiate its contents. *See SEC v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984) (parties bound by an agreement unless the court fails to approve it). Indeed, the parties did renegotiate the provisions for monetary relief, as well as other provisions. Judge Ingram rejected the Decree because he was "reluctant to venture into uncharted waters by approving of the decree at [that] time." *EEOC v. Pan American World Airways*, 34 Fair Empl. Prac. Cas. (BNA) 321, 323 (N.D.Cal. 1984). Despite the Supreme Court's "charting of the waters" in favor of the claimants, the EEOC seems to believe that it must again urge a court to approve its once-rejected Decree.

Fourth, it was Pan Am, and not the EEOC, that appealed Judge Ingram's order. The Commission did not appeal because it "believed that the process of resolving the case and returning the aging pilots to work would be accomplished more quickly by trial." Plaintiff EEOC's Reply Memorandum to Objections and Motion to Intervene at 16 n.4. It is a year and a half after Judge Ingram disapproved the decree and the claimants still have received no relief. Moreover, Pan Am specifically requested a remand so that this court could consider approving the former decree or a modification.

Finally, the EEOC's contention does not address the court's role. Even if the court were to accept the EEOC's argument that, as a matter of law (as opposed to agency policy), it could not alter the terms of its agreement with Pan Am, that in no way binds the court to accept the earlier agreement. The EEOC points to no authority requiring a court to bind itself to recent court decisions that affect the reasonableness of a proposed decree. Indeed, the

Decree itself permits either party to seek a modification because of a change in the law after approval of the Decree. Therefore, regardless of the correctness or wisdom of the EEOC's view that it is bound by its proposed agreements despite intervening changes in the law, the court must consider all the law in evaluating the Decree.

The Appropriate Standard of Review

"The sole question before the district court in reviewing a settlement agreement is whether the agreement is fundamentally fair or just." *Moore v. City of San Jose*, 615 F.2d 1265, 1271 (9th Cir. 1980). The EEOC agrees that this is the correct standard to apply in evaluating the objections of the National Airlines groups (pilots and flight engineers). The EEOC contends, however, that the court should apply a less rigorous standard when scrutinizing the effect of the settlement on claimants' interests. According to the EEOC, absent collusion, illegal conduct, or grossly unreasonable behavior, the district court must defer to the Commission's decision to settle the case on behalf of the claimants.

The EEOC misconceives the proper role of the district court in reviewing a proposed consent decree. It is true that in reviewing a proposed consent decree, the court should not seek to resolve the underlying factual and legal disputes. *Officers for Justice v. Civil Service Commission*, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). In addition, "[t]he proposed settlement is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Id.* (emphasis in original). Furthermore, the court notes the importance of voluntary settlements, especially in employment discrimination actions. *See Officers for Justice v. Civil Service Commission*, 473 F.Supp. 801, 803 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983).

At the same time, the court must still examine the reasonableness of the proposed consent decree, and not completely defer to the EEOC's proposal. Courts reviewing both class action settlements and proposed consent decrees in the employment discrimination context have used the standard of fairness, adequacy, and reasonableness. *See* 2 A. Larson & L. Larson, *Employment*

Discrimination, § 56.31; *see, e.g., Officers for Justice*, 688 F.2d at 625 ("universally applied standard [for reviewing settlement agreement under Rule 23(e)] is whether the settlement is fundamentally fair, adequate and reasonable"); *United States v. City of Alexandria*, 614 F.2d 1358, 1362 (5th Cir. 1980) (court will not approve a Title VII consent decree entered into by government and private party if the decree is unreasonable, illegal, unconstitutional, or against public policy); *Williams v. City of New Orleans*, 729 F.2d 1554, 1559 (5th Cir. 1984) (court must take active role in approving consent decree since the decree has a continuing effect); *Berkman v. City of New York*, 705 F.2d 584, 597 (2d Cir. 1983) (district court should not approve Title VII settlement that contains provisions that are unreasonable, unlawful, or against public policy).

The EEOC correctly states that the court should weigh in favor of approving the proposed Decree the participation of a government agency. *See, e.g., Williams*, 729 F.2d at 1560. But government participation in negotiating a consent decree does not insulate the decree from court review; it is simply one factor that the district court should consider in determining the reasonableness of the decree. *See, e.g., Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1178 (9th Cir. 1977) (presence of government agency an important factor in considering acceptability of settlement; standard of review, though, remains the same). *See also City of Alexandria*, 614 F.2d at 1362 (applies same standard in evaluating Title VII consent decree as in case brought by private party).

Moreover, the EEOC's participation should not lower the standard of review for evaluating the claims of those on whose behalf the agency proceeds, as argued by the EEOC. Courts consider the participation of the government in deciding on the fairness of a decree precisely because the government represents the interests of all groups, and not just those on whose behalf the government originally filed suit. *See, e.g., City of New Orleans*, 729 F.2d at 1560 (5th Cir. 1984). Unlike class representatives, the government has an obligation towards all parties. *See id.* In the present case, the EEOC represents the interests of the former EEOC employees, the claimants, and the public at large to the same degree. Likewise, the court should review the reasonable-

ness of the settlement with respect to each group under the same standard.

The few published cases in which a court has reviewed a proposed consent decree in the ADEA context do not counsel adopting a lower standard of review. In *EEOC v. Eastern Air Lines*, 35 Fair Empl. Prac. Cas. (BNA) 498 (S.D.Fla. 1983), fifteen parties sought to intervene after the EEOC and defendants had agreed to a proposed consent decree. The court denied the motion on the basis of the fairness, adequacy, and reasonableness of the decree, citing Title VII cases as support. *Id.* at 502 & n.12. Moreover, the court stated that "[f]airness is not susceptible of determination in a vacuum, but must be evaluated in light of the strength of the charging parties' case as well as other relevant considerations." *Id.* at 503. The court found that "the charging parties' case was not clear cut." *Id.* On the other hand, *EEOC v. Consolidated Edison Co. of New York*, 557 F.Supp. 468, 470 (S.D.N.Y. 1983), suggests that a court has a more limited role in reviewing proposed consent decrees. ("This suit is not a class action nor does it fall within any other of the limited categories of cases in which a Court is called upon to determine the fairness of a settlement.") The court, however, did not elaborate on this reasoning, and later noted that the claimants in that case had only a remote chance of success on the merits. *Id.* at 474.

The court believes that the standard of review of a proposed consent decree should be at least as great in the ADEA context as in the Title VII context. The substantive protections of both Acts are generally to be interpreted in the same way. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1979); *Criswell v. Western Airlines*, 709 F.2d 544, 548 (9th Cir. 1984), *aff'd*, 105 S.Ct. 2743 (1985). As discussed above, courts reviewing settlements in the Title VII area uniformly use the standard of fairness, adequacy, and reasonableness.

Furthermore, unlike Title VII, the ADEA does not explicitly provide for intervention by private parties in litigation by the EEOC. In fact, there is a strong argument that the ADEA does not permit intervention. *See* Schlei and Grossman, *Employment Discrimination Law*, 2d ed. at 1168 & n. 143 (1983). Title VII gives the individual victim of discrimination a right to intervene

specifically so that he can protect his interests in cases brought by the EEOC. *General Telephone v. EEOC*, 446 U.S. 318, 331 (1980). The court must be at least as protective of the rights of victims of age discrimination, since their rights of intervention are arguably more limited.

Finally, the court notes that a consent decree, unlike an extrajudicial settlement between two parties, bears the imprimatur of the court. "Judicial approval of a settlement agreement places the power and prestige of the court behind the compromise struck by the parties." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir. 1983). The court will not lend its authority to a decree that is not "fair, adequate and reasonable." *Id.* at 921. The court's determination involves balancing several factors including the strength of plaintiff's case; the risk of continued litigation; the presence of a government participant; and the amount offered in settlement. *See Officers for Justice*, 688 F.2d at 615. "The most important factor in determining whether the settlement is fair and adequate is the strength of plaintiff's claims." *Alaniz v. California Processors, Inc.*, 73 F.R.D. 269, 278 (N.D.Cal. 1976). "Ultimately, the district court's determination is nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.' " *Officers for Justice*, 688 F.2d at 625 (quoting *City of Detroit v. Grinnell*, 495 F.2d 448, 468 (2d Cir. 1974)).

Claimants' Objections to the Proposed Consent Decree

With the above in mind, the court now turns to evaluating the reasonableness of the Decree. The court first notes that the majority of the claimants (45 of 81) have so far objected to the terms of the Consent Decree. This is powerful evidence that the proposed Decree may not reasonably compensate claimants. A proposed settlement can be fair despite a large number of objections. *See, e.g., TBK Partners v. Western Union Corp.*, 675 F.2d 456, 462 (2d Cir. 1982). "At the same time, the number of objectors must be carefully considered." *Reed v. General Motors*, 703 F.2d 170, 174 (5th Cir. 1983); *see also TBK Partners*, 675 F.2d at 462. This is especially true when objectors contend that the proposed recovery is insufficient, rather than that it allocates the amount of recovery inequitably. *See Reed*, 703 F.2d at 174,

175. As stated by the Fifth Circuit, "[w]hile majority rule is not the test in every case, in the context of determining the total back pay award majority sentiment becomes highly relevant." *Pettway v. American Case Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

The court must consider the "package taken as a whole" in judging the fairness of the Decree. The proposed Decree contains both injunctive and monetary relief. Under the Decree, the 81 claimants will receive a total of $1.5 million. Pan Am will not pay this amount all at once, though; the claimants will divide $750,000 within 30 days of approval of the decree, and another $350,000 each of the following two years. Claimants' primary contention is that the Decree's monetary relief is not a reasonable settlement of their discrimination claims against Pan Am.

Monetary relief is especially important in an age discrimination case such as the present one. *Cf. Gabrielle v. Chrysler Corp.*, 573 F.2d 949, 954 (6th Cir. 1978) ("The need for quick dispute resolution is acute in the ADEA context since the very cause of the alleged discrimination, age, grows daily."). Indeed, in response to a survey conducted by the EEOC in early 1985, 36 claimants indicated a desire to return to flying, 32 stated that they no longer wished to be employed, and 13 did not respond. Declaration of Fritz Wollett ¶ 8. One of the 81 pilots has already died, and is represented in this proceeding by his estate. Reinstatement is a hollow remedy for pilots that can no longer fly because of declining health or atrophied skill caused by involuntary retirement.

In *Officers for Justice*, 688 F.2d at 628, the Ninth Circuit approved a settlement that provided plaintiffs with "only a fraction of the potential recovery." However, "[t]hroughout the lengthy history of [that case], the primary concern of the plaintiffs was to halt the allegedly discriminatory practices and to assure the future integration of minorities and women into the S.F.P.D." *Id.* Plaintiffs in *Officers for Justice* directly benefitted from the injunctive provisions of the consent decree approved in that case. The injunctive provisions here, by contrast, only benefit those who remain able to fly after their long, involuntary retirement. Moreover, even this benefit is of limited value since many

of these individuals are nearing the mandatory retirement age of 70.

To evaluate the proposed relief properly, the court must first compare it to the amount plaintiffs could potentially recover discounted by the claimants' likelihood of success on their claims. *See, e.g., Reed*, 703 F.2d 170, 172 (5th Cir.1983) ("A district court faced with a proposed settlement must compare its terms with the likely rewards the class would have received following a successful trial of the case."). As discussed above, though, the court should not reach any ultimate conclusions on contested issues of fact or law. *Officers for Justice*, 688 F.2d at 625.

Claimants could potentially recover much more than the Decree presently provides. In estimating plaintiffs' potential recovery, the court assumes that a flight engineer earns an average salary of $60,000 per year. *See* Fourth Declaration of Sanford Rosen, ¶ 17. Counsel at the hearing did not dispute this figure, and counsel for the EEOC stated that flight engineers actually earn $70,000 per year. Based on the actual retirement dates of 13 of the claimants, Pan Am owes claimants an average of $330,000 each. *See id.* Assuming that this group is a representative sample of all 81 claimants, and there is no evidence to the contrary, Pan Am is potentially liable for approximately $26.7 million ($300,000 per claimant multiplied by 81 claimants). Counsel for Pan Am, in response to a question from the court, conceded that Pan Am's liability could be as much as $20 million.

This $26.7 million figure conservatively estimates Pan Am's liability. The $26.7 million does not compensate claimants for inflation or the time value of money. *See Criswell v. Western Airlines*, 514 F.Supp. 384, 396 (C.D.Cal. 1981) (granting prejudgment interest at the California statutory rate of seven percent in age discrimination action). In addition, if Pan Am flight engineers actually earn $70,000 per year, as suggested by counsel for the EEOC, Pan Am's liability would increase by approximately $4.5 million. Furthermore, the $26.7 million figure is current only through August 1985; each month Pan Am incurs an additional liability of approximately $320,000 ($4,000 per month in salary multiplied by 81 claimants).

Pan Am could face even greater liability. If this case were to go to trial, a court could award front pay to the claimants. *See, e.g., Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1448, 1449 (11th Cir. 1985) ("an award of front pay . . . may be an appropriate remedy in an age discrimination suit because reinstatement would be impracticable or inadequate."); *Cancellier v. Federated Department Stores*, 672 F.2d 1312, 1319, 1320 (9th Cir.) (damages in lieu of reinstatement permissible in ADEA case in which employee and employer can no longer coexist in a working relationship), *cert. denied*, 459 U.S. 859 (1982). This case, originally filed in 1981, may have engendered the type of atmosphere in which a court would award front pay.

Pan Am also faces the possibility of liability for double damages for willfully violating the ADEA. *See* 29 U.S.C. § 626 (b). A violation of the Act is willful if an employer either knows its behavior violates the Act or shows reckless disregard for the Act's requirements. *Trans World Airlines v. Thurston*, 105 S.Ct. 613, 624 (1985). An employer can violate the Act willfully without having "an evil motive or bad purpose." *Id.* at 624 n.19.

In *Thurston*, the Supreme Court reversed the Second Circuit's finding that TWA willfully violated the Act. The Court found that "TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA." *Id.* at 626. After meeting with its attorneys to discuss the effect of the 1978 amendments to the ADEA, TWA adopted a plan that would permit 60 year old pilots in "flight engineer status" to continue working for the airline. *Id.* TWA adopted this policy over the vehement objections of the Air Line Pilots Association, which filed a separate lawsuit against TWA. *Id.*

TWA, thus, immediately examined the legality of its policies under the ADEA and, in 1978, became "the only trunk airline that voluntarily . . . permitted [persons] over 60 to continue working as flight engineers." *Id.* at 625 n.23 (quoting *Thurston v. Trans World Airlines*, 713 F.2d 940, 957 (2d Cir. 1983) (Graafeiland, J., dissenting)). Within months after Congress amended the ADEA, TWA permitted pilots to bid for flight engineer vacancies, which allowed them to work beyond 60. Pan Am, in sharp contrast, did not permit pilots to bid for vacancies and remain

with the airline past the age of 60 until 1983, five years after the amendments to the ADEA. Unlike TWA, which sought, though unsuccessfully, to comply with the ADEA, Pan Am did not alter its policy towards its pilots in response to the 1978 amendments. While the court does not find that Pan Am would be liable for willfully violating the Act, the possibility of double damages in this case does dramatically raise Pan Am's potential liability.

Moreover, the $1.5 million that the Decree offers to claimants is less than first appears. Claimants would receive only half of this amount now, and the remainder over a two year period. They receive no compensation for the effects of inflation or the interest they have foregone.

In sum, Pan Am faces a potentially substantial liability. Indeed, counsel for Pan Am conceded that Pan Am could be liable for $20 million. The Consent Decree offers claimants $1.5 million, spread out over 2 years with no compensation for inflation or the time value of money. The fairness of reducing claimants' potential recovery to this extent turns on the strength of claimants' underlying claim.

The Strength of the Claimants' Case

The major dispute between claimants and applicants concerns the effect on the present case of recent decisions involving age discrimination claims brought by pilots against airlines. The EEOC originally argued that Pan Am violated the ADEA by not permitting age 60 pilots to displace (or "bump") flight engineers and continue flying. Pan Am argued that it permitted pilots to displace flight engineers only in the limited circumstances permitted under its collective bargaining agreement, a bona fide seniority system. Claimants argue that the Supreme Court's recent decision in *Trans World Airlines v. Thurston*, 105 S.Ct. 613 (1985), establishes that Pan Am's policy violated the ADEA.

Pan Am also contends that its policy of not permitting pilots to serve as flight engineers past the age of 60 may be justified as a "bona fide occupational qualification (BFOQ)." Pan Am argues that *Johnson v. American Airlines*, 745 F.2d 988 (5th Cir. 1984), *cert. denied*, 105 S.Ct. 3500 (1985), provides support for this position. Claimants assert that *Johnson* is distinguishable from

the present case, and that it provides little support for Pan Am now that the Supreme Court has issued *Thurston*.

The effect of Thurston

Thurston, like the present proceeding, involved an airline's treatment of age 60 pilots. In 1977, TWA and the Air Line Pilots Association (ALPA) entered into a collective bargaining agreement under which all employees in a cockpit position would retire at age 60. This provision was lawful under the ADEA as a "bona fide seniority system." Effective April 6, 1978, Congress amended the ADEA to prohibit the mandatory retirement of an individual because of his age. In response to the 1978 amendments to the ADEA, and over opposition from its union, TWA changed its treatment of age 60 pilots. TWA began permitting any employee in "flight engineer status" to continue working beyond the age of 60. A captain could obtain "flight engineer status" by bidding for a position under the collective bargaining agreement. He would receive a position only if there was a vacancy. *Id.* at 618-19.

A captain displaced for reasons other than age did not need to use the collective bargaining procedures. For example, if TWA eliminated a captain's position because of reduced manpower needs, the captain could bump a less senior flight engineer. Similarly, captains displaced for medical reasons, or other reasons relating to their competency to serve, could automatically bump flight engineers. *Id.* at 619.

The Supreme Court unanimously held that TWA's policy violated the ADEA. "The Act does not require TWA to grant transfer privileges to disqualified captains. Nevertheless, if TWA does grant some disqualified captains the 'privilege' of 'bumping' less senior flight engineers, it may not deny this opportunity to others because of their age." *Id.* at 621. Moreover, TWA could not defend its policy as part of a "bona fide seniority system." "[A]ny seniority system that includes the challenged practice is not 'bona fide' under the statute. The Act provides that a seniority system may not 'require or permit' the involuntary retirement of a protected individual because of his age." *Id.* at 623.

In many ways, TWA treated its age 60 pilots more even-handedly than Pan Am did. Beginning in 1978, TWA permitted

age 60 pilots to bid for flight engineer vacancies. Pan Am did not permit pilots approaching age 60 this privilege until 1983, two years after the commencement of this action. Pan Am, however, had permitted younger pilots to bid for flight engineer vacancies ever since 1963. At Pan Am, unlike TWA, a pilot approaching the age 60 could not even take advantage of a flight engineer vacancy so that he could continue flying.

Moreover, Pan Am's policy regarding a pilot's ability to bump a flight engineer seems directly analogous to TWA's. At Pan Am, like TWA, a pilot displaced because of a reduction in the airline's need for pilots could displace less senior officers, including flight engineers. In addition, on one occasion Pan Am permitted a pilot disqualified for medical reasons to serve as a flight engineer. Indeed, Pan Am still does not permit a pilot approaching the age of 60 to displace a flight engineer.

Pan Am contends that its actions are distinguishable from TWA's. It argues that since it did not automatically permit a displaced pilot to bump a flight engineer, it did not violate the ADEA. Pan Am misapprehends the meaning of *Thurston*. *Thurston* specifically stated that an airline could not "grant *some* disqualified captains the 'privilege' of 'bumping' less senior flight officers," while "deny[ing] this opportunity to others because of their age." *Id.* at 621 (emphasis added). A Pan Am pilot displaced because of his age could never displace a flight engineer, while pilots displaced for other reasons could. The fact that TWA permitted pilots displaced for reasons other than age greater opportunities to displace flight engineers than Pan Am did does not make Pan Am's policy less discriminatory. Discrimination cannot be quantified in this way; an employer either deprives an employee a privilege of employment because of the employee's age or it does not. Pan Am deprived its age 60 pilots of privileges available to other employees.

The EEOC implicitly acknowledges that Pan Am's policy violates *Thurston*. Unlike Pan Am, the EEOC speaks of *Thurston's* "clarification of the law governing the rights of age-60 pilots to transfer to flight engineer positions." Plaintiff EEOC's Reply Memorandum to Objections and Motion to Intervene at 1. Instead of arguing that the law remains uncertain, as Pan Am

does, the EEOC contends that recent cases "do not give the Commission the right to change the terms of the settlement reached in 1983 when the law was much less certain and the risks of litigation substantially greater." Reply Memorandum at 13. The EEOC does concede that "[i]t is unfortunate, perhaps, that the Commission's lawyers were not blessed with greater foresight so that they could have anticipated in early 1983 the ultimate outcome in *TWA* and *Western*." Reply Memorandum at 28.

Furthermore, Pan Am would have great difficulty claiming that its policy resulted from a bona fide seniority system. *Thurston* specifically held that a seniority system that required or permitted the involuntary retirement of a protected individual because of his age was not bona fide under the Act. *Thurston*, 105 S.Ct. at 623. Pan Am's seniority system seems to come within this language.

The Effect of Johnson

Pan Am contends that it based its policy towards 60 year old pilots on a bona fide occupational qualification. Pan Am argues that its policy of not permitting former captains to become flight engineers was designed to prevent the effects of "command syndrome." Command syndrome occurs, according to Pan Am, when a senior airman placed in a subordinate position mentally or physically resumes his former role as captain, especially during emergencies. (In common terms, and in *Johnson*, this phenomenon is called "back seat driving.") Command syndrome can interfere with the new captain's commands, or divert the attention of the engineer himself. In either case, according to Pan Am, command syndrome endangers passenger safety—the essence of its business. Claimants contend that *Johnson* does not provide authority for Pan Am's claimed defense.

Plaintiffs in *Johnson* challenged American's policy of requiring all members of the cockpit crew, including flight officers (the equivalent of Pan Am's flight engineers), to retire or transfer to non-cockpit positions at age 60. American, like Pan Am, operated its aircraft with a three-person crew that included a flight officer who did not actually pilot the plane. Unlike Pan Am, however, American did not allow any individual who could not ascend to the rank of captain to remain in the cockpit. American argued

that employing ex-captains as flight officers would both block the advancement of other cockpit crew members to the pilot position, and present a safety hazard since former pilots might revert to their old roles during emergencies. 745 F.2d at 991. The Fifth Circuit affirmed a jury verdict that American Airlines had established a BFOQ defense.

A court should use a two-part inquiry for deciding the merits of a BFOQ defense. *Western Airlines v. Criswell*, 105 S.Ct. 2743, 2753 (1985). First, the qualification that the employer claims it is seeking must be reasonably necessary to the essence of its business. *Id.* at 2751. Second, the employer can rely on a particular age as a proxy for safety-related job qualifications only when it is compelled to do so. The employer can establish this in one of two ways: First, the employer can show that it had a factual basis for believing that all or substantially all of the persons over the particular age would be unable to perform the job safely. Alternatively, the employer can establish that it is impossible or highly impractical to deal with employees on an individualized basis. *Id.* at 2752.

In *Johnson*, defendant introduced sufficient evidence to support a BFOQ defense. Defendant presented evidence that permitting pilots to become flight officers would block the training position for future pilots and endanger safety. Defendant also presented two expert witnesses who testified that the presence of senior ex-captains as flight officers created a possibly dangerous situation. The expert witnesses testified that it was impossible to determine which ex-captains would pose a safety hazard.

Johnson, however, does not provide Pan Am with a strong defense of its policy. First, *Johnson* had failed to move for a directed verdict or judgment notwithstanding the verdict. Therefore, the court limited its review "to whether there was *any* evidence to support the jury verdict." 745 F.2d at 994 (emphasis in original).

Second, *Johnson* specifically declined to decide whether an employer could use a BFOQ defense when it made exceptions to its general policy. *Id.* at 994 n.4. The court noted that that question was pending before the Supreme Court in *Thurston*, and

stated that the issue had not been presented to it. *Thurston*, as discussed above, held that an employer cannot deny employees based on age the privileges it grants other employees.

Pan Am permits numerous exceptions to its general policy of preventing senior pilots from flying as flight engineers. These exceptions undermine Pan Am's contention that its policy is based on safety concerns. Pilots can become flight engineers in lieu of furlough, for example. One pilot that no longer qualified for a first class medical certificate also began flying as a flight engineer. Indeed, Pan Am's policy since 1983 of permitting pilots approaching age 60 to bid for flight engineer vacancies belies its argument that permitting senior pilots to fly as flight engineers would endanger the safety of the flying public. Pan Am has also permitted former pilots Kiehl and Hazelwood, who brought a separate age discrimination suit against Pan Am, to return as flight engineers. The Supreme Court has rejected a BFOQ defense precisely because the employee was "able to point to reputable businesses in the same industry that . . . eschew[ed] reliance on mandatory retirement earlier than 70." *Western Airlines v. Criswell*, 105 S.Ct. 2743, 2756 (1985). Claimants can point both to other reputable businesses in the same industry, such as TWA, and to Pan Am's practice, itself, in refutation of any evidence of safety concerns that Pan Am could offer. Finally, the Supreme Court has recently stated that "like its Title VII counterpart, the BFOQ exception 'was in fact meant to be an extremely narrow exception to the general prohibition' of age discrimination contained in the ADEA. *Criswell*, 105 S.Ct. at 2751 (quoting *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977)).

Pan Am's Financial Status

Claimants contend that Pan Am's recently improved financial position permits Pan Am to increase the monetary compensation it has offered them. Pan Am does not specifically contradict this statement, but recites financial statistics that ostensibly establish Pan Am's weak financial health. Neither party has demonstrated Pan Am's actual financial status. Pan Am cites its losses for the years 1980-1984 without giving a sense of the airline's current condition, or the breakdown by year of these losses. In addition, even these statistics only account for the losses of Pan American

World Airways, excluding World Services and Pan American Corporation. The court has no basis for determining the nature of the relationship among these various related entities. Moreover, Pan Am does not provide any data on the effect that a larger settlement would have on its financial health or the current economic viability of the airline. Claimants' data consist of newpaper and magazine articles discussing Pan Am's economic prospects. The court cannot draw conclusions of any kind regarding Pan Am's financial condition based on the sketchy data presented by the parties.

Claims of Third Parties

Objections of Former National Airlines Flight Engineers and Pilots

The former National Airlines flight engineers object to paragraph 14 of the Decree, which provides:

> The terms of the Award of Lewis M. Gill dated March 12, 1981, remains [sic] unchanged, but shall not be a bar to the right of a claimant or current pilot who possesses cross-bidding rights to be awarded or be assigned to a Flight Engineer position under the terms of this Consent Decree.

According to the NAL engineers, this paragraph would impermissibly destroy their legitimate expectations and lawful rights by permitting the 81 claimants and all future Pan Am pilots to transfer to engineer positions held by former National Airlines employees.

The former National Airlines Pilots also base their objections on the terms of the Gill award. Under the award, until the end of 1985, furloughs alternate between Pan Am employees and former National Airlines employees. The former National pilots bear ⅔ of the burden of the furloughs borne by former National employees. They argue that the Decree may force the furlough of some former National pilots.

Pan Am correctly notes that this situation will almost inevitably not occur. The first flight engineers trained under the Decree would not likely be able to assume positions for three or four months. As it is already the end of October, and the court

disapproves the Decree, the alternating system will not be in effect if and when the first newly trained flight engineers are ready to assume their positions.

The former National Airlines pilots also assert that they will lose positions in the future as a result of the Decree. They argue that some of the engineers displaced by pilots in the future may, in turn, be able to displace former National pilots with less seniority.

The heart of both groups' claims is that the Decree would upset the provisions of the Gill Award, described above, which merged the seniority lists of Pan Am and the former National Airlines. Under the Gill Award, the seniority systems of the different employee groups remained, in effect, substantially the same as before the merger; former National pilots and engineers continued to have no bidding rights whatsoever for each other's positions. Indeed, the former National groups are in separate bargaining units from the Pan Am groups. Since former National employees were not involved in any way with the practices challenged by the EEOC, and because the Decree does not benefit any former National employees, they object to the Decree.

During the course of the fairness hearing, counsel for applicants contended that the Decree would not interfere with the provisions of the Gill Award. Counsel argued that disputes involving interpretation of the Gill award could be solved by arbitration, as the award provides, notwithstanding the Decree. In response to a suggestion from the court, counsel agreed to rewrite paragraph 14 of the Decree to reflect this understanding that the proposed decree would not interfere with the Gill Award and its mechanisms for resolving disputes concerning its interpretation. The court believes that this reasonably resolves the dispute between applicants and the National Airlines groups as it preserves their right to arbitrate any disputed interpretation of the Gill Award without the bar of a federal judgment.

Objection of Intervenors Rankin et. al.

Rankin, a furloughed Pan Am pilot/flight engineer (as are his fellow intervenors), claims that the Decree violates the terms of

the Employee Retirement Income Security Act (ERISA). Rankin raises two arguments: First, he claims that returning and current pilots are not eligible for retirement benefits, as the Decree seemingly provides. Second, he contends that Pan Am has breached its fiduciary duty to the participants in the plan by using retirement funds to settle its dispute with the EEOC. Pan Am disputes Rankin's arguments.

The Consent Decree does not establish that pilots who become flight engineers are automatically entitled to receive retirement benefits while working. The Decree only states that returning pilots "shall receive such benefits . . . to which they are entitled in accordance with the terms of the plans as of their normal retirement date as a pilot." ¶ 9. These are funds that the returning pilots would receive whether or not they returned as flight engineers.

Moreover, the court need not presently determine whether returning flight engineers are entitled to continue to receive pension benefits. Pan Am's plan specifically provides for a dispute resolution procedure, as required by ERISA. *See* 29 U.S.C. § 1133. Indeed, the Ninth Circuit requires that a party exhaust his administrative remedies before bringing an ERISA claim to the court. *See Amato v. Bernard,* 618 F.2d 559, 566, 567 (9th Cir. 1980). As with the claim by the former National employees, the court finds that it would be reasonable to require intervenor Rankin to use the appropriate dispute resolution mechanisms instead of resolving his claim first at the federal court level. *See id.* at 568 ("[P]rior fully considered actions by pension plan trustees interpreting their plans and perhaps also further refining and defining the problem in given cases, may well assist the courts when they are called upon to resolve the controversies.").

On Claimants' Motion to Intervene

The objecting claimants have moved to intervene for the limited purpose of objecting to the proposed Decree. Pan Am asserts that claimants have no statutory right to intervene in any aspect of this action. They argue that the statutory scheme presumes that the EEOC is an adequate representative, and vests the EEOC with the exclusive right to pursue claims it has filed.

The EEOC does not object to the claimants' intervention for the limited purpose they seek.

Section 7(c)(1) of the ADEA, 29 U.S.C. § 626 (c)(1), provides:

> Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the [EEOC] . . . to enforce the right of such employee under this chapter.

Courts and commentators disagree on the extent to which this provision prevents intervention in ADEA actions brought by the EEOC. *See, e.g., EEOC v. Boeing,* 37 Fair Empl. Prac. Cas. (BNA) 1657 (W.D. Wash. 1985); Schlei and Grossman, *Employment Discrimination Law,* 2d ed. at 1168 & n.143 (1983). The EEOC has not taken an official position on this issue.

The court need not enter this fray since claimants presently seek to intervene only to object to the Decree. In *Boeing,* airline pilots who were being represented by the EEOC in an ADEA action against Boeing sought to intervene. The court rejected both mandatory and permissive intervention as counter to the statutory scheme of the ADEA. The court did, however, permit "limited participation" under its equitable powers. *Id.* at 1660. The pilots' status was a "hybrid . . . fall[ing] somewhere between that of an *amicus* and an intervenor." *Id.* at 1657 n. 2. The court cited the EEOC's lack of opposition to limited participation in support of its order. *Id.* Similarly, the EEOC in this proceeding has not objected to the claimants motion to intervene for purposes of objecting to the consent decree. The court, analogously to *Boeing,* permits claimants to intervene for the limited purpose of objecting to the Decree.

CONCLUSION

After carefully considering applicants' arguments, and the objections of the various parties, the court disapproves the Decree. The settlement agreement offers claimants inadequate compensation for their years of involuntary retirement. In addition, a majority of claimants have formally objected to the Decree. Despite the government's participation in this action, and the preferred place of settlements in employment discrimination actions, the court cannot approve the Decree.

IT IS SO ORDERED.

October 21, 1985

/s/ ROBERT F. PECKHAM
Chief United States District Judge